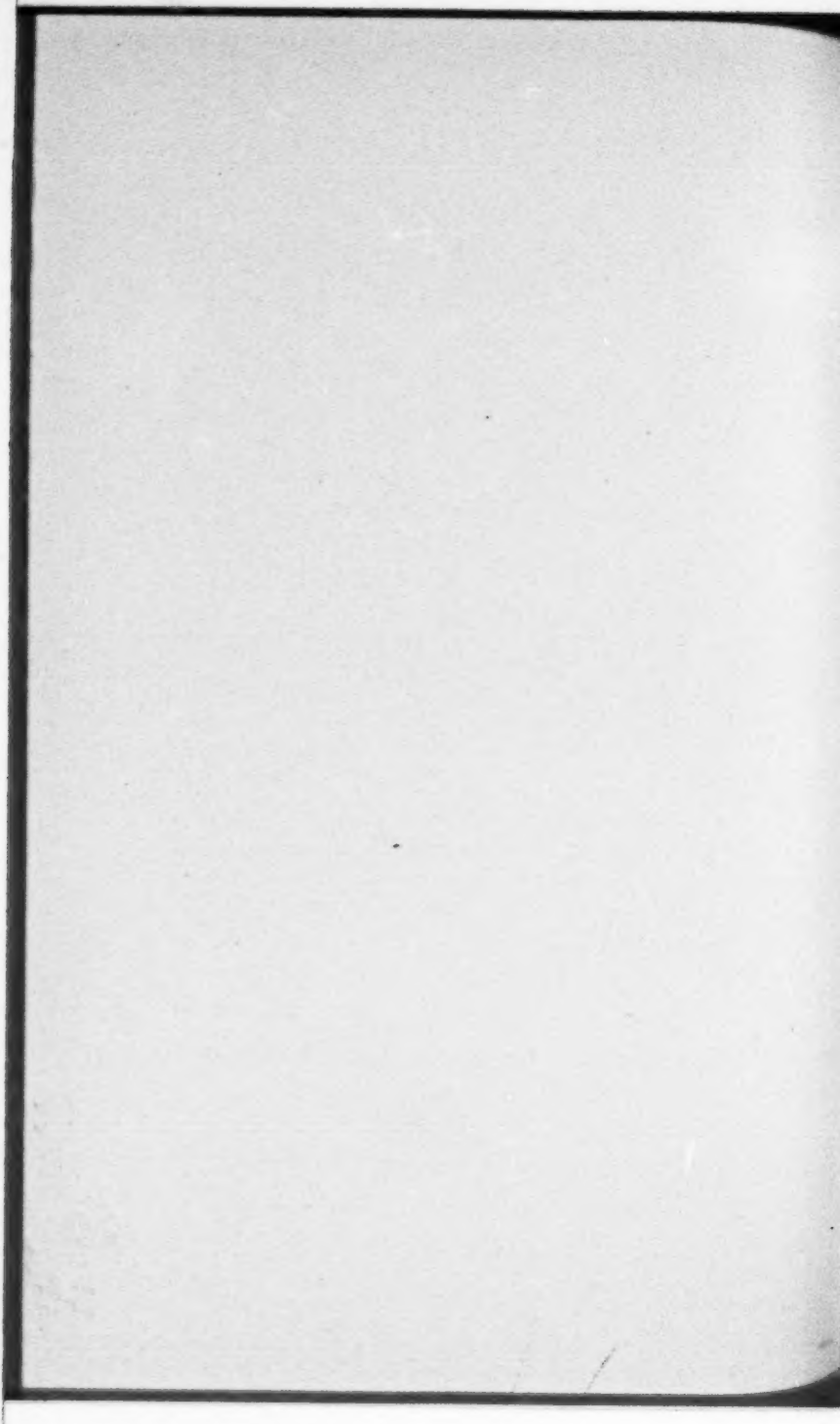

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 177

C. V. SORRELLS, PETITIONER,

against

THE UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

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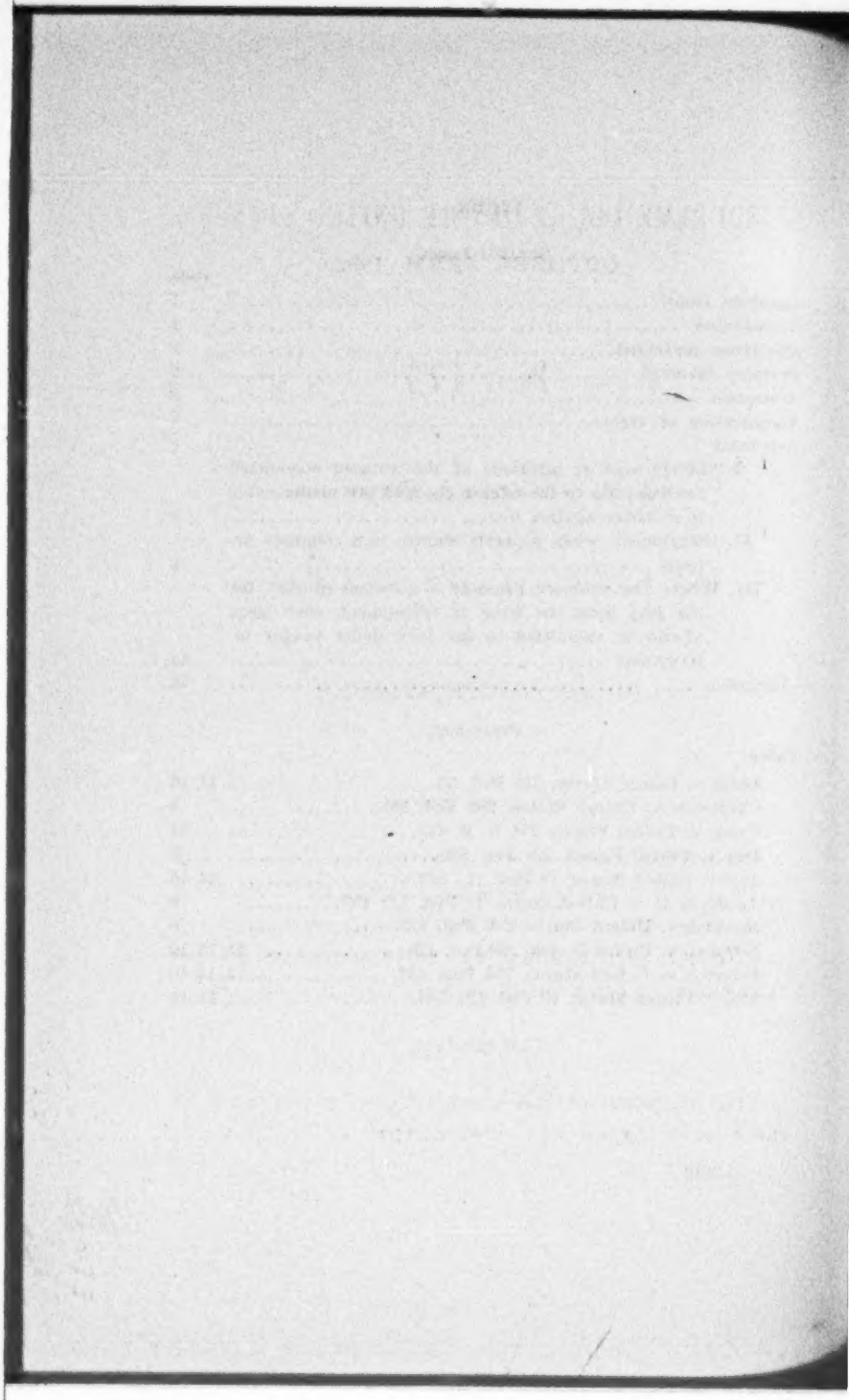

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Opinions Below.

No written opinion was filed by the United States District Court for the Western District of North Carolina. The opinion of the Circuit Court of Appeals for the Fourth Circuit affirming the judgment of the District Court is reported in 57 Fed. (2d) 973 (R. 26).

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Fourth Circuit was entered April 15, 1932 (R. 41).

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code (as amended), 28 U. S. C. A., Sec. 347.

Questions Presented.

May similar acts or conduct of an accused committed subsequently to the act charged in the bill of indictment be introduced in evidence against him?

Does entrapment, when relied upon by an accused and properly shown by the evidence, constitute a valid defense to a criminal prosecution?

Where the evidence presents a question of fact for the jury upon the issue of entrapment, should such issue be submitted to the jury under proper instructions?

Statutes Involved.

National Prohibition Act, as amended January 15, 1931, Chapter 29, 46 Stat. 1036; 27 U. S. C. A., Sec. 91:

> "Wherever a penalty or penalties are prescribed in a criminal prosecution by this title, for the illegal manufacture, sale, transportation, importation, or exportation of intoxicating liquor, as defined by section 4 of this title, the penalty imposed for each such offense shall be a fine not to exceed $10,000 or imprisonment not to exceed five years, or both: *Provided,* That any person who violates the provisions of this title, in any of the following ways: (1) by a sale of not more than one gallon of liquor as that word is defined by section 4 of this title: *Provided, however,* That the defendant has not

theretofore within two years been convicted of a violation of this title or is not engaged in habitual violation of the same; (2) by unlawful making of liquor, as that word is defined by said section, in an amount not exceeding one gallon, in the production of which no other person is employed; (3) by assisting in unlawfully making or unlawfully transporting of liquor, as above defined, as a casual employee only; (4) by unlawfully transporting not exceeding one gallon of liquor, as above defined, by a person not habitually engaged or employed in, or not theretofore within two years having been convicted of a violation of such law, shall for each offense be subject to a fine of not to exceed $500 or to be confined in jail, without hard labor, not to exceed six months, or both."

Statement.

Petitioner, who was the defendant in the court below, and who will hereafter be referred to as the defendant, was convicted of violating the National Prohibition Act, in that he was charged with the sale on July 13, 1930, of one-half gallon of liquor to one, R. V. Martin, a Federal Prohibition Agent.

The Bill of Indictment contained two counts, the first alleging that the defendant, on the 13th day of July, 1930, possessed a large quantity of liquor, to-wit: one-half gallon, and the second count alleged that the defendant, on the 13th day of July, 1930, did unlawfully and feloniously sell to one, R. V. Martin, a large quantity of intoxicating liquor, to-wit: one-half gallon.

The first witness introduced by the Government was one, M. A. White, Prohibition Agent, who, over objection by the defendant, was permitted to testify that at a time *subsequent* to the date of the alleged sale contained in the bill of indictment, he, the said White, purchased whiskey from the defendant.

The second witness introduced by the Government was one, R. V. Martin, who testified that he was a Federal Prohibition Agent, and that on the 13th day of July, 1930, which was a Sunday, he, together with two other men, residents of Haywood County, North Carolina, visited the home of the defendant where the said Martin was introduced to the defendant as being a furniture dealer from Charlotte, North Carolina, spending a vacation in Haywood County, North Carolina, and that he was desirous of securing some whiskey. That the defendant stated he did not fool with whiskey, and, thereupon, the Prohibition Agent again asked the defendant to procure some whiskey, and that after repeating such request two or three times and after considerable conversation, it transpired that the defendant, the Prohibition Agent and one of the other men present had served in the same division of the American Army during the Great War. Their experiences in the war were discussed, and finally, after repeated urging on the part of the Prohibition Agent, the defendant said that he would go and see if he could get some whiskey. The defendant left his home and was gone from twenty to thirty minutes, returning with one-half gallon of whiskey, which he delivered to the Prohibition Agent in exchange for the sum of five dollars.

The Prohibition Agent testified that he was the first and only person among those present at the home of the defendant who said anything about securing liquor and was the first person to mention the subject. The Prohibition Agent further testified that at the time he asked the defendant to procure some liquor the Agent did so with the expressed view and purpose in mind to indict and prosecute the defendant for procuring and selling liquor, and that such was the purpose of the witness when he went to the home of the defendant and procured the liquor, and that after the Prohibition Agent procured the liquor from the defendant the Agent went before a United States Commissioner and took the proper steps to have the defendant arrested and subsequently tried for the said offense. The witness, over objection by the defendant, was permitted to testify as to the *subsequent* transaction with the defendant.

The Government then rested its case and the defendant thereupon moved the court for a directed verdict of not guilty or for a motion as of non-suit. The motion was overruled and the defendant objected and excepted and the exception was then and there allowed.

The defendant then offered testimony tending to show entrapment and introduced as witnesses in his behalf the three men who accompanied the Prohibition Agent to the home of the defendant and who testified as to the actions and conduct of the Prohibition Agent in inducing and enticing the defendant to procure the whiskey for the Agent. All the witnesses for the defendant who were present at the time of the alleged of-

fense testified in substance that the Prohibition Agent requested the defendant to procure him some liquor and that the defendant stated he did not fool with whiskey and that the Agent repeated his request three or four times and was only able to induce the defendant to procure the liquor after repeated requests and following a general conversation of something like an hour to an hour and a half in length.

The defendant offered several character witnesses who testified they had known the defendant anywhere from five years to the entire extent of the defendant's life, that they were residents of defendant's community and that his general character was good. That the defendant was an employee of the Champion Fiber Company of Canton, North Carolina, and had worked every day since March, 1924. The defendant then rested and renewed his motion for a directed verdict of not guilty or for a judgment of non-suit, which motion was then and there denied and the defendant objected and excepted and the exception was then and there allowed.

The Government, in rebuttal, again offered the witness, M. A. White, who testified, over the objection and exception of the defendant, that he purchased a half gallon of whiskey from the defendant subsequent to the offense for which the defendant was being tried, and the Government introduced certain officers who testified that the defendant's character was bad. The Government did not recall the Prohibition Agent, Martin, to the stand, and at no time during the proceeding did the Agent, Martin, ever testify that he had any suspicion of the defendant being engaged in violating the

Prohibition Law, and there was no evidence introduced on the part of the Government tending to show that the Agent, Martin, knew anything about the defendant.

At the conclusion of all the testimony the defendant again renewed his motion for a directed verdict of not guilty or for a judgment as of non-suit, which motion was denied and the defendant then and there excepted and the exception was then and there allowed.

The defendant tendered the court a written request for instructions, which were refused, and marked "not given" by the court, and the defendant objected and excepted. The court, thereupon, charged the jury that the court held as a matter of law no entrapment had been shown and that if the jury believe the testimony of the Prohibition Agent that he bought a half gallon of liquor from the defendant the jury would convict him. The defendant, following the charge by the court to the jury and before the jury retired to make up its verdict, objected and excepted to the charge of the court. The jury, thereupon, found the defendant guilty and after the usual motions were made by the defendant as appear in the record herein, the defendant was sentenced by the court to a term of eighteen months in the United States Penitentiary at Atlanta, Georgia.

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred in affirming the decision of the District Court in that:

1. The court erred in its failure to find that the evidence of similar acts committed *subsequent* to the of-

fense charged in the bill of indictment were inadmissible and prejudicial to the rights of the defendant; and

2. The court erred in its failure to find that from the evidence adduced at the trial, a clear case of entrapment was shown, thereby entitling the defendant to a directed verdict of not guilty; and

3. The court erred in its failure to find that the issue of entrapment should have been presented to the jury under proper instructions.

ARGUMENT.

While there are eight assignments of errors in the record, there are but three propositions involved, which will be herewith set forth in their regular order.

First Proposition.

The admissibility of the testimony of the Government's witnesses, White and Martin, as to the *subsequent* transactions with the defendant.

In making out its case the Government was allowed to show against the defendant's objection that an alleged sale was made by the defendant approximately a month after the alleged commission of the offense for which the defendant was on trial.

> "It is a familiar and long established rule that similar acts or misdeeds of the accused are inadmissible against him except where they are material in proof of some necessary element of the offense for which he is on trial. This rule is laid down by all the text writers and in numberless decisions. An exception is found in

cases where criminality of the act depends upon the intent of the accused, and the wrongful intent must therefore be established. In such cases evidence may be given of *prior* misconduct of like character for the purpose of proving the intent with which the particular act was committed."

Day v. *United States,* 220 Fed. 818 (at 819) (4th Cir.); *Carpenter* v. *United States,* 280 Fed. 598 (at 600) (4th Cir.); *Newman* v. *United States,* 289 Fed. 712 (at 716) (4th Cir.); *Lynch et al.* v. *United States,* 12 Fed. (2) 193 (at 194) (4th Cir.).

Second Proposition.

The court should have directed a verdict in favor of the defendant upon the resting by the Government of its case.

It is seriously and earnestly contended that the evidence introduced by the Government against the defendant clearly showed entrapment. The Prohibition Agent, Martin, who purchased the whiskey, admitted on cross examination that he was the first and only person to mention the question of securing liquor and that he asked and begged the defendant two or three times to procure the liquor. The witness testified that the defendant stated he did not have any whiskey and that he did not fool with it and that it was only after considerable conversation and repeated urging on the part of the Agent that the defendant was persuaded to go off and procure the whiskey. The Agent further testified on cross examination that he went to the home

of the defendant with the express purpose of endeavoring to have the defendant procure and sell him, the Agent, liquor and that if he, the Agent, was successful in inducing the defendant to procure whiskey to then indict and prosecute the defendant for the commission of the offense.

The particular attention of the Court is respectfully directed to the fact that the record fails to contain a scintilla of evidence tending to show that the defendant, prior to the time of the visit to his home by the Prohibition Agent, was suspected of handling or selling liquor and there is not a scintilla of evidence in the record tending to show that the defendant, prior to the time of the offense alleged in the bill of indictment, had ever in any manner handled or sold liquor. The record also fails to disclose a scintilla of evidence to the effect that the Prohibition Agent suspected the defendant or had any reports concerning the defendant prior to the commission of the offense alleged in the bill of indictment.

> "Where officers of the law have incited a person to commit the crime charged and lured him to its consummation with the purpose of arresting him in its commission the law will not authorize a verdict of guilty."
>
> "When the criminal design originates, *not with the accused,* but is conceived in the mind of the Government Officers and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the Government is estopped by sound public policy from prosecution therefor. The first duty of the officers of the law is to prevent, not to

> punish, crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it."

Peterson v. *United States,* 255 Fed. 433 (9th Cir.); *Butts* v. *United States,* 273 Fed. 35 (at 36) (8th Cir.); *Newman* v. *United States,* 299 Fed. 126 (at 131) (4th Cir.); *Silk* v. *United States,* 16 Fed. (2) 568 (8th Cir.); Annotations and Note in 18 A. L. R. 143 at 149 and 164.

It is earnestly insisted that if upon the resting by the Government of its case, the defendant was not at such time entitled to a directed verdict of not guilty, he was at the conclusion of all of the testimony entitled to such directed verdict.

The testimony offered by the defendant showed conclusively that he was persuaded and induced by the Prohibition Agent to procure the liquor and that the defendant did so only after repeated requests and solicitations by the Agent. The defendant's testimony further showed that the Agent was the first and only person who brought up the subject of whiskey and that nothing was said about whiskey, nor were there any indications that the defendant had any desire, opportunity or facilities for the procuring of any whiskey.

The testimony offered by the defendant showed that he was a regular employee of the Champion Fiber Company of Canton, North Carolina, and that he had been regularly employed by such Company from March, 1924, continuously to the time of his trial, and the record discloses the fact that the defendant

had not missed a single pay roll during such period of time.

Again the particular attention of the Court is respectfully directed to the fact that the entire testimony in the record, including the rebuttal testimony of the Government, fails to show a scintilla of evidence to the effect that *prior* to the commission of the alleged offense the defendant had any reputation as a liquor dealer or that he was suspected of handling liquor, or *that prior* to the alleged offense the Prohibition Agent suspected the defendant or had any report as to the defendant handling liquor.

In the recent case of *Casey* v. *United States,* reported in 276 U. S. 413, in which four of the Justices of this Court dissented from the majority view the question of entrapment was not raised in the trial court nor in the proceedings for review before the Circuit Court of Appeals for the Ninth Circuit, yet, nevertheless, we find that this Court upon its own volition discussed this proposition and in the majority opinion handed down by Mr. Justice Holmes, he says:

> "We do not feel at liberty to accept the suggestion that the government induced the crime. A Court rarely can act with advantage on its own motion and very rarely can be justified in giving judgment upon grounds that the record was not intended to present."

The majority opinion in the Casey case, however, then proceeds to discuss that portion of the evidence contained in the record, which might have tended to

show entrapment, and the opinion concludes with this statement:

> "Whatever doubts we may feel as to the truth of the testimony we are not at liberty to consider them on the only question before the Court. The grounds for uneasiness can be considered only by another power."

In one of the dissenting opinions in the Casey case, *supra*, Mr. Justice Brandeis said:

> "The question presented is whether possession within the District of morphine not in the original stamped package is evidence sufficient to sustain the charge that it was illegally purchased therein. I have no occasion to consider that question. *For, in my opinion, the prosecution must fail because officers of the government instigated the commission of the alleged crime.*
>
> The obstacle to the prosecution lies in the fact that the alleged crime was instigated by officers of the government; that the act for which the government seeks to punish the defendant is the fruit of their criminal conspiracy to induce its commission. The government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature.
>
> The fact that no objection on the ground of entrapment was taken by the defendant, either below or in this Court, is without legal significance. This prosecution should be stopped, not because some right of Casey's has been denied, but in order to protect the government. To protect it from illegal conduct of its officers.

> To preserve the purity of its Court. In my opinion the judgment should be vacated with directions to quash the indictment."

Third Proposition.

If the evidence on the question of entrapment is in conflict, it presents an issue of fact which the Court should have submitted to the jury on proper instructions.

It is respectfully contended that if the evidence on the question of entrapment is clear and uncontradicted the Court should then direct a verdict of not guilty, but, if the evidence on the question is in conflict, it thereupon presents an issue of fact for the jury on proper instructions, and it is not within the province of the Court to decide it.

It is earnestly contended that the evidence in this case as relates to entrapment is not in conflict, but on the contrary shows conclusively that the defendant was induced and persuaded to violate the law by the agent of the government, and such being so, the Court should have directed a verdict of not guilty because the necessity for submitting the question of entrapment to the jury arises only where there is a direct conflict in the testimony offered on this question.

> "Where the evidence on the question of entrapment is in conflict it presents an issue of fact for the jury on proper instructions and it is not within the province of the Court to decide it. If it be made out by the proof to the satisfaction of the jury it constitutes a complete defense to the charge."
>
> *Jarl* v. *United States,* 19 Fed. (2) 891 (at 896) (8th Cir.).

"When in a criminal prosecution the question of entrapment arises the defendant is entitled to an accurate statement of the law of entrapment. The jury should be instructed as to what in law constitutes entrapment and it is then a question of fact to be determined by the jury under such instructions as to whether or not there was an entrapment."

Newman v. *United States,* 299 Fed. 126 (at 131) (4th Cir.).

"In a criminal prosecution where the defense was that the defendant was incited and induced to commit the offense by officers for the purpose of entrapment the refusal of instructions submitting that question to the jury as one of fact and the giving of instructions treating it as one of law and charging that it presented no defense was error."

Peterson v. *United States,* 255 Fed. 433 (9th Cir.); *Butts* v. *United States,* 273 Fed. 35 (at 38) (8th Cir.).

The defendant, in apt time, presented the Court with a written request for instructions, which were refused, and the Court erred in its charge to the jury when it charged them as follows:

"Gentlemen of the jury, the defendant's counsel takes the position that this man was induced or entrapped to sell liquor. The Court holds as a matter of law that was not the case and the Court instructs that if you believe the testimony of Mr. Martin, the witness who said he bought a half gallon from the defendant, you will convict him then. You will take the case and go out with it or you can form your opinion here."

Peterson v. *United States*, 255 Fed. 433 (9th Cir.); *Butts* v. *United States*, 273 Fed. 35 (at 38) (8th Cir.); *Newman* v. *United States*, 299 Fed. 126 (at 131) (4th Cir.); *Silk* v. *United States*, 16 Fed. (2) (at 570) (8th Cir.); *Jarl* v. *United States*, 19 Fed. (2) 891 (at 896) (8th Cir.).

Conclusion.

Accordingly we have the unique situation of presenting to this Court for consideration an issue as to which several of the Justices of this Court have already expressed views sustaining the argument of the petitioner, and in addition the contention and position of petitioner has been accepted in every Federal Circuit. Petitioner's contention is supported also by logic and by dictates of fairness and justice.

It is respectfully submitted, therefore, that the decree of the United States Circuit Court of Appeals for the Fourth Circuit should be reversed.

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